COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2009-SC-000821-D

TECO MECHANICAL CONTRACTOR, INC. — APPELLANT

v.

BRIEF OF APPELLEE

COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC PROTECTION
CABINET, et al. — APPELLEES

On Appeal from Kentucky Court of Appeals
Case No. 2008-CA-000305
Franklin Circuit Court Civil Action No. 05-CI-00464

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that an original and ten (10) copies of the Brief of Appellee were served via hand-delivery upon the Clerk, Kentucky Supreme Court, 700 Capital Avenue, Frankfort, KY 40601; copies mailed, U.S. postage prepaid, to: Clerk, Kentucky Court of Appeals, 200 Democrat Drive, Frankfort, KY 40601; Phillip J. Shepherd, Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, KY 40602; Everett C. Hoffman, Esq., 800 Republic Building, 429 W. Muhammad Ali Blvd., Louisville, KY 40202; David A. Velander, Esq., 105 S. Sherrin Ave., Louisville, KY 40207; David J. Guarnieri, Esq. and Chapman Hopkins, Esq., McBrayer, McGinnis, Leslie & Kirkland, PLLC, 201 E. Main Street, Suite 1000, Lexington, KY 40507; and Gerry L. Calvert, Esq., 115 W. Short Street, Lexington, KY 40507, this 15th day of July, 2011.

Mark F. Bizzell

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee Kentucky Labor Cabinet agrees with the Appellant that oral argument may assist the Supreme Court in deciding the constitutional issues presented, and therefore requests oral argument.

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COUNTERSTATEMENT OF THE CASE

The Appellee Kentucky Labor Cabinet submits the following Counter Statement of the Case in order to clarify the Cabinet as the successor to the Department of Labor, and to present the relevant facts and procedural events in an objective manner.

A. The Parties

1. TECO Mechanical Contractor, Inc. (hereinafter "TECO") was the plaintiff in the circuit court action. TECO worked as the subcontractor on numerous public projects that were the subject of prevailing wages audits. (R. at 1; Complaint, ¶¶'s 1, 7).

2. The Commonwealth of Kentucky Environmental and Public Protection Cabinet was the defendant in the circuit court action. It included the Kentucky Department of Labor[1], now the Labor Cabinet, which is responsible for enforcing the prevailing wage laws pursuant to KRS Chapters 336 and 337. (R. at 1; Complaint, ¶ 3).

3. McKnight & Associates, Inc., D.W. Wilburn, Inc., Isaac Tatum Construction, Inc., Todd Johnson Contracting, Inc., Burchfield & Thomas, Inc., Garrett Construction Company and Vector, LLC were the Third party Defendants in the circuit court action. These parties acted as the prime contractors on the various public projects where TECO worked as a subcontractor. (R. at 146; Cross Claims).

4. The Kentucky State Building and Construction Trades Council, AFL-CIO, the Associated General Contractors of Kentucky, Inc., the Associated Builders and Contractors of Kentuckiana, Inc. and the Mechanical Contractors Association of Kentucky, Inc. were each permitted to

[1] At the time the initial Complaint was filed, executive branch reorganization had resulted in an "Office of Workplace Standards" within the "Department" of Labor, which was in turn located within the Cabinet for Environmental & Public Protection, the named Defendant/Appellee in this case. In 2008, by Executive Order 2008-472, the Labor Cabinet and the Department of Workplace Standards were reestablished. The Cabinet/Department of Workplace standards has been the agency with legislative authority to enforce the Commonwealth's wage and hour laws contained in KRS Chapter 207, 336, 337 and 339 since at least 1945. For simplicity, the former "Department of Labor" and the current "Labor Cabinet" will hereinafter be referred to as "the Cabinet".

intervene in the circuit court action. (R. at 112, 212, 285 and 364; Orders Permitting Intervention).

B. Statement of Facts and Procedural History:

TECO provided subcontractor services on the following public works projects: Laurel County Secure Juvenile Detention Center, Pulaski Elementary School, Burnside Elementary School, Mercer County Elementary School, Picadome Elementary School, Madison County Library, Georgetown Indoor Recreational Facility, Clinton County Learning Center, Knox County Hospital Skilled Nursing Unit and the Woodford County Recreational Center. (R. at 1; Complaint, ¶ 7). Each of these jobs was bid as a public project. *See* KRS 337.505 *et. seq.*[2] (R. at 1, ¶ 8). The Cabinet performed several wage audits concerning TECO's classification of the work its employees performed on the above projects, and on November 21, 2002, it notified TECO that $150,781.82 was owed in back wages to several of its employees whose work on the various jobs the Cabinet claimed had been misclassified as general labor as opposed to skilled labor. (R. at 18-29). After further investigation, the Cabinet amended its wage audits at least twice: On March 4, 2004, the Cabinet reduced the amount TECO allegedly owed to $77,571.69. (R. at 30). Later, in a telephone conversation on February 18, 2005, the Cabinet reduced the amount allegedly owed to $63,494.21. (R. at 34).

On February 25, 2005, the Cabinet advised TECO that if it did not pay $51,620.65 (which amount equaled a compromised settlement proposal of $47,620.65 in back wages and $4,000.00 in civil penalties), then it would commence efforts to seek restitution from the prime contractors on the projects in question. (R. at 34). The Cabinet took this action pursuant to KRS 337.990(12) which makes prime contractors jointly and severally liable for violations of

[2] KRS 337.505 requires contractors to pay its employees the prevailing wage, as set by the Prevailing Wage Review Board, on any such project.

subcontractors. When TECO failed to do so, the Cabinet notified the respective prime contractors for each job in question that TECO had "failed to correctly compensate employees for hours worked on the above referenced project[s]" and it demanded that the prime contractors pay the disputed amounts on or before March 31, 2005. (R. at 36-58).

On March 30, 2005 TECO filed its Complaint and Petition for Declaration of Rights in the Franklin Circuit Court. (R. at 1). Therein, TECO raised two constitutional challenges to KRS Chapter 337.505-550 (hereinafter referred to as "the Act"). First, TECO claimed that the fact that the Cabinet could conduct wage audits, issue notices of violation, and assess civil penalties against it before providing an opportunity to be heard in an administrative hearing constituted a deprivation of due process. Second, TECO claimed that the statutes in question improperly delegate power to the Cabinet to determine worker classifications and that the same are not defined by statute. TECO simultaneously filed a Motion for a Temporary Restraining Order, asking that the Cabinet be enjoined from taking further action in its efforts to collect the wages owed allegedly owed wages from the prime contractors before there was a decision on the merits. (R. at 10). The trial court issued the requested Restraining Order, thereby restraining the Cabinet from "attempt to collect the allegedly owed back wages. . . ." (R. at 62).

In an amended answer, the Cabinet asserted counterclaims against TECO and filed Third Party Complaints against the various prime contractors seeking a judgment for the allegedly owed wages, as well as civil penalties against TECO. (R. at 146). After several parties were permitted to intervene, and a period of written discovery, TECO moved for Summary Judgment on the constitutional issues. (R. at 366). That Motion was denied. (R. at 592). TECO filed a Motion to Alter, Amend or Vacate, (R. at 605), which also was denied. (R. at 904). TECO and the Cabinet then participated in a two-day bench trial, after which the trial court entered a

judgment in favor of the Cabinet for $64,163.47 in back wages and $9,000.00 in civil penalties. (R. at 1039; Findings of Fact, Conclusions of Law and Final Judgment). TECO filed its Notice of Appeal and posted a Superseadeas Bond on February 13, 2008. (R. at 1076, 1078.)

On review, the Kentucky Court of Appeals entered an Opinion Affirming in Part and Vacating in Part on November 20, 2009 (See Appellant's Brief, Appendix A "Ct. App. Opinion"). The Court of Appeals therein affirmed the trial court's ruling as to the constitutionality of Act, but vacated the trial court's judgment in favor of the Cabinet and remanded the matter for further proceedings. TECO then filed a Motion for Discretionary Review with this Court, seeking review only as to the constitutional issues ruled upon by the Court of Appeals. The motion was granted on March 16, 2011. (See Appellant's Brief, Appendix E).

ARGUMENT

I. The Court of Appeals correctly upheld the constitutionality of the Act.

Before the trial court and the Court of Appeals TECO challenged the constitutionality of certain portions of KRS Chapter 337, Kentucky's prevailing wage statute, also known as "the Act". In doing so, TECO bears a heavy burden, as stated in *Holbrook v. Lexmark Intn'l Group, Inc.* 65 S.W.3d 908, 914-915 (Ky. 2001) to wit:

> Particularly when they involve the regulation of economic matters, the acts of the legislature are entitled to a strong presumption of constitutionality. *Delta Air Lines, Inc. v. Com., Revenue Cabinet*, 689 S.W.2d 14 (Ky. 1985). A statute involving the regulation of economic matters or matters of social welfare complies with both due process and equal protection requirements if it is rationally related to a legitimate state objective. The constitutionality of a statutory classification will be upheld if the classification is not arbitrary, or if it is founded upon any substantial distinction suggesting the necessity or propriety of the classification. *See Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446, 455 (Ky. 1994); *Estridge v. Stovall*, 704 S.W.2d 653, 655 (Ky.App. 1985). Thus, a party seeking to have a statute declared unconstitutional is faced with the burden

of demonstrating that there is no conceivable basis to justify the legislation. *Buford v. Commonwealth*, 942 S.W.2d 909 (Ky.App. 1997)

The current federal law, the Davis Bacon Act, was enacted in 1931 and there are other similar federal prevailing wage laws that cover most federal construction projects. "The [Davis-Bacon] Act was 'designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area." *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 776 (1981). Some state prevailing wage laws date back as early as 1891, and 33 states currently have prevailing wage laws. *Kentucky's Prevailing Wage Law Its History, Purpose and Effect,* Peter Philips, Ph.D., October, 1999. (R. at 493). The Kentucky law dates to 1940 and shares in common with other such laws the feature that a prevailing wage be paid to specific classifications of workers for a locality (or county, or other geographic or political subdivision). It was passed in order to prevent contractors in the construction of public works from exploiting the laborers they employ in order to enhance their profits. *Cassady v. Board of Alderman*, 277 S.W.2d 1,2 (Ky. 1955). The prevailing wage law has been in operation in Kentucky in one form or another for about 65 years. That history as well as the prevalence of the prevailing wage law in both federal and state construction, has made it a part of the fabric of the construction industry. Tt cannot be said that the law has no rational basis, or that there is no conceivable basis to justify the legislation.

(a) TECO was not entitled to an administrative hearing before issuance of the Cabinet's notice of violation, demand for payment, and assessment of civil penalty.

Pursuant to the Act, the Labor Cabinet's role is to investigate complaints of prevailing wage law violations. KRS 337.550(1) provides that the Cabinet shall "investigate and enforce" the prevailing wage laws and "shall bring all actions to collect wages due ...". Thus when an investigation determines that a violation exists, the statutes require the Cabinet to file an action in

court to enforce that claim. The Cabinet has no other means to enforce a determination regarding a prevailing wage violation. TECO argued before both the trial court and the Court of Appeals that the Cabinet must conduct an administrative hearing comporting with the procedural due process "prior to imposition of civil penalties against it and the collection of back wages..." (Appellant's Brief at 5). Therefore, TECO asserts, because the Act does not provide for an administrative hearing, it is unconstitutional.

TECO's argument was rejected both by the trial court and the Court of Appeals based upon the United States Supreme Court's holding in *Lujan v. G & G Fire Sprinklers, Inc.* 532 U.S. 189, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001). In *Lujan* the California Labor Code (Code) authorized the state to order withholding of payments due to a contractor on a public works project if a subcontractor failed to comply with certain code requirements. The contractor, in turn, was permitted to withhold similar sums from the subcontractor, and the contractor or his assignee were permitted to sue the awarding body for alleged breach of contract in not making payments to recover the wages or penalties withheld. The State Division of Labor Standards (DLSE) determined that the respondent, G & G, had violated the code, and issued notices directing the awarding body to withhold from the contractors an amount equal to the wages and penalties forfeited due to G & G's violations. The awarding bodies withheld payment from the contractors, who in turn withheld payment to G & G. G & G then filed suit in federal court, claiming that the issuance of the notices without a hearing deprived it of property without due process. The district court granted summary judgment, declared the relevant portions of the statute unconstitutional, and enjoined enforcement of the same. The Ninth Circuit affirmed. The U.S. Supreme Court, however, granted certiorari, vacated the judgment, and remanded for reconsideration based upon its holding in *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40,

119 S.Ct. 977, 143 L.Ed.2d 130 (1999). In that case the Court found that the respondents had no property interest in payment for disputed medical treatment pending review of the reasonableness and necessity of the treatment, as authorized by state law. On remand, the Ninth Circuit reinstated its prior judgment and opinion on other grounds, stating that G & G's rights were not violated because they were deprived of immediate payment, but because the state statutory scheme afforded no hearing at all. On appeal, the Supreme Court again granted certiorari and reversed.

The Court began its analysis by stating that "[w]here a state law such as this is challenged on due process grounds, we inquire whether the State has deprived the claimant of a protected property interest, and whether the State's procedures comport with due process." *Lujan* at 195. In reviewing the lower court's decision the Court assumed that the withholding of money due to a contractor under its contracts amounted to state action under state law, and that G & G had a property interest in it claim for payment under its contract. *Id.* The Court then reviewed the cases relied upon by the Ninth Circuit that dealt with claims of deprivation of a property interest without due process when it held that G & G was entitled to a reasonably prompt hearing upon when payments were withheld. The Court summarized them as follows:

> In [*United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993)] *Good*, we held that the Government must afford the owner of a house subject to forfeiture as property used to commit or to facilitate commission of a federal drug offense notice and a hearing before seizing the property. (citation omitted). In [*Barry v. Barchi,* 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979)] *Barchi* we held that a racetrack trainer suspended for 15 days on suspicion of horse drugging was entitled to a prompt postdeprivation administrative or judicial hearing. (citation omitted). And in [*FDIC v. Mallen*, 486 U.S. 230, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988)] *Mallen*, we held that the president of a Federal Deposit Insurance Corporation (FDIC) insured bank suspended from office by the FDIC was accorded due process by a notice and hearing procedure which would render a decision within 90 days of the suspension. (citation omitted). See also *Sniadach v. Family Finance Corp. of Bay*

> *View*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (19690 (holding that due process requires notice and a hearing before wages may be garnished).

Lujan at 195, 196.

The Court then concluded that, unlike G & G, the claimants were denied a right to which they were presently entitled, either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation. *Id.* at 196. However, "[u]nlike those claimants, respondent [G &G] has not been denied any present entitlement. G & G has been deprived of payment that it contends it is owed under a contract, based upon the States determination that G & G failed to comply with the contract's terms. G & G has only a claim that it did comply with those terms and, therefore ,that it is entitled to be paid in full. Though we assume for purposes of decision here that G & G has a property interest in its claim for payment…it is an interest, unlike the interests discussed above, that can be fully protected by an ordinary breach of contract suit." *Id.* at 196.

The Court addressed what process is due to G & G. Citing the case of *Cafeteria & Restaurant Workers v McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961) (citations omitted) the Court observed:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." "[D]ue process", unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.' It is compounded by history, reason, and past course or decisions…"

Lujan at 196, 197.

The Court found that because the Code states that a contractor or his assignee may sue the awarding body for a breach of contract, it provided a means for subcontractors to bring a claim for breach of contract. *Id.* at 197. Also, even if a subcontractor could not obtain an assignment of the right to sue the awarding body, the Court found that California common law

allows a subcontractor to bring a lawsuit against the contractor. *Id.* Lastly, the Court dismissed G & G's argument that, should it get an assignment from the contractor and sue the awarding body, that a suit is inadequate because the awarding body retains the wages and penalties pending outcome of the litigation. "A lawsuit of that duration, while undoubtedly something of a hardship, cannot be said to deprive respondent of its claim for payment under the contract." *Id.* at 198. Therefore the Court held that "if California makes ordinary judicial process available to respondent for resolving its contractual dispute, that process is due process." *Id.* at 197.

Because the facts of the case at bar are nearly indistinguishable from the facts in the *Lujan* case, both the trial court and the Court of Appeals found the case to be persuasive and relied upon it in upholding the constitutionality of the Act. The Court of Appeals correctly noted:

> [A]lthough the Act does not specifically provide for the filing of a direct action in circuit court by an aggrieved party, we hold that such a right in inherent in the Act. Because a "party to be affected by an administrative order is entitled to procedural due process[,]" *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964), absent the provision for an administrative hearing, a party affected by an administrative order must be entitled to seek relief in circuit court. As noted above, any proceeding in circuit court would be an original action, not an appeal from an administrative adjudication. Upon the foregoing, we uphold the constitutionality of the Act despite its failure to provide an administrative hearing.

(Ct. App. Opinion at 19).

In the case at bar, TECO attempts, for the first time, to distinguish the facts in this case from *Lujan*. To begin, TECO asserts that, unlike the Act, "[i]n *Lujan*, the aggrieved party had a statutorily vested right to bring a breach-of-contract suit to pursue payment that had been withheld". (Appellant's Brief at 8). This is not entirely accurate. In *Lujan*, the Supreme Court held that, if a subcontractor was not given an assignment by the contractor to sue the awarding authority as allowed by statute, California common law provided a remedy by allowing a

subcontractor to bring a lawsuit against the contractor for breach of contract. And in this Commonwealth, as the Court of Appeals correctly noted, by common law (i.e. *American Home Beauty*), absent the provision for an administrative hearing, a party affected by an administrative order has an inherent right under the Act to seek relief in circuit court. TECO's attempt to distinguish *Lujan* on this point thus fails.

Next, TECO attempts to distinguish the harm it allegedly suffered from that of the respondent in *Lujan*, presumably to argue that it had a property interest to which it was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation, thus entitling it to a reasonably prompt due process hearing. First, TECO states that its "interests were significantly and negatively impacted by the Cabinet's actions though the imposition of monetary penalties." (Appellant's Brief at 9). Throughout this case, however, TECO has never quantified any monetary loss suffered. Further, while TECO repeatedly refers to the Cabinet's issuance of a notification of violation and assessment of civil penalty to it as an "enforcement action," the Court of Appeals correctly noted "[i]n order to enforce the provisions of the Act, the Cabinet must bring a legal action." (Ct. App. Opinion at 18). Thus, the act of mailing a notice of violation and citation for civil penalties was not an "enforcement action" by the Cabinet, and in receiving the same TECO suffered no harm.

TECO next asserts that "b]y taking enforcement actions against TECO's prime contractors, the Cabinet impugned TECO's reputation and damaged its ability to conduct business." (Appellant's Brief at 9). This statement contains a number of errors. To begin, the Cabinet did not take enforcement action against TECO: it was TECO who filed suit against the Cabinet, who then counterclaimed against TECO. Also, the Cabinet did not issue a notice of violation or citation for civil penalties against any of TECO's prime contractors. The Cabinet

merely sent letters informing them of their liability for the unpaid wages under KRS 337.990(12) and requested payment. (Appellant's Brief at 2-3). There is further no evidence in the record to support TECO's assertion that its ability to conduct business has in any way been affected by the Cabinet's issuance of the notice of violation or citation for a civil penalty to TECO or by the letter sent to its prime contractors. Even if its reputation had suffered, the same does not constitute a deprivation of a property interest. Reputation alone is not a constitutionally protected liberty or property interest. The stigma of damage to a reputation must be coupled with the loss of another constitutionally protected interest (typically a property interest in continuing public employment) in order for procedural due process to be triggered. *Paul v. Davis,* 424 U.S. 693, 701 (1976). "The Due Process Clause is implicated only when state conduct alters 'a right or status previously recognized by state law." *Id* at 711. "This has come to be known as the 'stigma-plus' test." *Cutshall v. Sundquist*, 193 F.3d 466, 479 (6th Cir. 1999). The act of sending the letters to TECO's prime contractors, even if they did harm TECO's business reputation, were not accompanied by any other action that deprived TECO of a legally recognized right.

Further, TECO asserts that "the same judicial process [as in *Lujan*] on the facts of this case would not provide the same nature and degree of redressability to TECO." (Appellant's Brief at 9). It is curious as to what redress TECO did not get or to which it believes it is entitled. In *Lujan* the respondent's payment under its construction contract was withheld, and yet the Supreme Court held that its due process rights were fully protected by its access to ordinary judicial process through a breach of contract action. In the case at bar, TECO had already been paid by its prime contractors, and merely received a notice that its employees were entitled to wages it had not paid. Upon receipt of the Cabinet's notice of violation and citation of civil

penalty TECO suffered no monetary loss because the Cabinet had not taken a step to enforce its notice in circuit court. Moreover, it was TECO who sought and received redress "through the ordinary judicial process" when it initiated a declaratory action. TECO's assertion that a *de novo* declaratory action civil trial does not provide "the same nature and degree of redressability" as a common law suit in contract, as found sufficient to satisfy due process in *Lujan*, is without merit.

In order to establish that its procedural due process rights have been violated, TECO must first establish that its property interest was impaired by the Cabinet's actions. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Weiand v Board of Trustees of Ky. Retirement System,* 25 S.W.3d 88, 93 (Ky. 2000); *Marksberry v. Chandler,* 126 S.W.3d 747, 749 (Ky. App. 203). As demonstrated above, TECO did not, and cannot demonstrate or establish that it suffered any adverse consequences as a result of the Cabinet's issuance of the notice of violation and citation for civil penalties, TECO, therefore, cannot establish that its property interest was impaired by the Cabinet's action.

In sum, the United States Supreme Court held in *Lujan* that due process is flexible and whether it is provided depends on the time, place and circumstances, viewed through the lens of history, reason, and past course or decisions. When faced with a circumstance, like *Lujan*, in which a statute had no provision for an administrative hearing, the Court of Appeals correctly noted that based upon the common law of this Commonwealth (i.e. *American Home Beauty*), a party affected by an administrative order, absent the provision for an administrative hearing, has an inherent right under the Act to seek relief in circuit court. This was precisely the basis for the Supreme Court in Lujan finding the California statute constitutional. TECO has not established that it has a protected property interest. Assuming *arguendo* that it had, TECO has not

established that it was denied a right by virtue of which it was presently entitled either to exercise dominion over real or personal property, or to pursue a gainful occupation. Indeed, TECO's position is similar to, if not better than the respondent in *Lujan*, which the Supreme Court found had not been denied any present entitlement, but had been merely deprived of payment under a contract. The trial court and the Court of Appeals correctly held that, because TECO had access to, and availed itself of the ordinary judicial process to seek redress for the Cabinet's actions under the Act, TECO's due process rights were not violated and the Act is constitutional. TECO's assertion that it was entitled to an administrative hearing before the issuance of the Cabinet's notice of violation, demand for payment, and assessment of civil penalties is without merit and the decision of the Court of Appeals must be affirmed.

(b) The cases cited by TECO do not support its claim that it was entitled to an Administrative Hearing prior to the Cabinet's issuance of the notice of violation, demand for payment, and assessment of civil penalties.

TECO cites a number of cases to support its argument that it was entitled to an administrative hearing prior to the Cabinet's issuance of the notice of violation, demand for payment, and assessment of civil penalty. (Appellant's Brief at 6) Those cases, *Fayette County Bd. of Education v. M.R.D.,* 158 S.W.3d 195 (Ky. 2005); *Jenny Wiley Health Care Center v. Commonwealth,* 828 S.W.2d 657 (Ky. 1992); *Cabinet of Human Resources v. Kanter,* 898 S.W.2d 508, 510 (Ky. App. 1995); and *Blackburn v. Board of Education,* 564 S.W.2d 35 (Ky. App. 1978) deal with the due process rights of litigants in trial type administrative proceedings before administrative agencies. In those cases, the agencies had been given statutory authority to not only investigate and enforce violations of statute, but to adjudicate them as well. In the case at bar, and as the Court of Appeals noted, no such adjudicative authority has been given to the Cabinet. If it had, the Cabinet would be required to provide adversely affected parties with a

trial type hearing prior to depriving them of a property or liberty interest. But those cases do not hold that the General Assembly was required to assign adjudicative authority to an agency that exercises investigatory and prosecutorial functions, nor that the failure to do so is unconstitutional.

TECO also cited the case of *Kaelin v. City of Louisville*, 643 S.W.2d 590 (Ky. 1982) for the broad proposition that all administrative agencies must conduct trial type administrative hearings whenever they take any action that affects the rights of private parties. TECO's reliance thereon is misplaced. *Kaelin* was a zoning case, and dealt with the constitutionally required trial type hearings before zoning boards. Those boards must conduct such hearings because they exercise legislative functions for which *de novo* review in circuit court is prohibited. Because enforcement actions by the Cabinet of the prevailing wage laws are adjudicated in court, *Kaelin* and other zoning procedural due process cases are not applicable.

II. The Cabinet did not take "preemptive enforcement action "against TECO.

(a) The issuance of a notice of violation for back wages and citation for a civil penalty against TECO was not an enforcement action.

TECO argues on pages 10-14 of its brief that the Cabinet took "preemptive enforcement" against TECO when it issued a notice of violation for back wages and citation for a civil penalty. Before addressing this argument, several points of clarification must be made. To begin, before TECO sought to have the Franklin Circuit Court and the Court of Appeals declare portions of "the Act" unconstitutional. The portions of "the Act" challenged by TECO are contained in KRS Chapter 337.505-550. (Ct. App. Opinion at 2). They contain Kentucky's wage and hour laws regarding the application, determination and payment of the prevailing wage to workers engaged in construction of public works. KRS 336.985 is titled "Enforcement of civil penalties imposed in KRS Chapters 336, 337, and 339." It gives authority to and directs the Secretary to initiate

civil actions to collect civil penalties issued pursuant to the above chapters which deal with various wage and hour violations, including the Act. As discussed below, TECO never included KRS 336.985 in its Complaint in arguing before either the trial court or the Court of Appeals. Instead, TECO argued before the trial court and the Court of Appeals that "portions of the Act are unconstitutional because there is no provision for a due process hearing regarding the classification of workers by the...Cabinet...Additionally...the Act does not provide adequate guidance regarding the classification of workers." (Ct. App. Opinion at 2). The Court of Appeals explained the function of the statute and the Cabinet's role in enforcement of it:

> Once a prevailing wage is established, any contractor or subcontractor shall "pay not less than the rate of wages so established." KRS 337.530(1). Furthermore, all contractors and subcontractors are required to
>
> > Keep full and accurate payroll records covering all disbursements of wages to their employees to whom they are required to pay not less than the prevailing rate of wages. Such records shall indicate the hours worked each day by each employee in each classification of work and the amount of paid each employee for his work in each classification.
>
> KRS 337.530(2). Pursuant to KRS 337.550, any laborer, workman, or mechanic employed on a prevailing wage project may file a complaint with the Cabinet and the Cabinet is required to assist any such employee in obtaining any wages owed. Furthermore, the Act requires the Cabinet to investigate violations and enforce its provisions, which the Cabinet may do through legal action. KRS 337.550(2). Finally, the Cabinet may seek civil penalties against anyone violating the Act by issuing a citation. If any citations is not paid within fifteen days, the Cabinet shall initiate a civil action to collect the penalty. KRS 336.985.

(Ct. App. Opinion at 15-16).

And further:

> As noted above, to enforce the Act, the Cabinet or an aggrieved employee may file a legal action. Furthermore, in order to enforce any citation seeking a civil penalty, the Cabinet must file a civil action.

(Ct. App. Opinion at 17).

And still further:

> In order to enforce the provisions of the Act, the Cabinet must bring a legal action. Because there is no provision in the Act for an administrative hearing regarding the propriety of a violation, fine, or assessment of back wages, any enforcement action by the Cabinet in circuit court must allow for an adversarial trial on the merits.

(Ct. App. Opinion at 18).

It is unmistakably clear from the opinion of the Court of Appeals that the Cabinet enforces the provisions of KRS Chapter 337 and collects civil penalties under the provisions of KRS 336.985 through the filing of a civil action in circuit court. Put another way, the Court of Appeals clearly defined "enforcement" to mean the initiation and prosecution of a civil action in circuit court. Put yet another way, the act of issuing a notice of violation and assessment of back wages, and a citation for a civil penalty to an employer by the Cabinet *is not an enforcement action.*

Throughout its brief to this Court, TECO defines "enforcement" differently. Therein TECO stated that "[h]ere, the Cabinet *enforced* the provisions of the Act *by assessing fines and back wages against TECO and its prime contractors* and did so without initiating a civil action against TECO....Consequently, any determination by the Court of Appeals that TECO was afforded a sufficient due process hearing by virtue of recourse in this post-enforcement proceeding was in error." (Appellant's Brief at 11) (Emphasis added). This is the basis for TECO's assertion that the Cabinet took "preemptive enforcement" against it, requiring a due process hearing before doing so. To begin, TECO states:

> [t]he Court of Appeals recognized the need for a hearing in this instance in order for the Cabinet to properly pursue civil penalties against TECO...*Citing to KRS 336.985,* the Court of Appeals found that *the Act* provided a due process hearing because "in order to enforce any citation seeking a civil penalty, the Cabinet must first file a civil action..." (Ct. App. Opinion at 15 [should be 17])....Moreover, and *relying entirely on* the United States Supreme Court's opinion in *Lujan v. G*

> *& G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001), the Court of Appeals *deemed the process set forth in KRS 336.985 to be constitutionally sufficient* to satisfy due process in this instance in so far as "access to ordinary judicial process is due process." (Ct. App. Opinion at 16 [should be 18]).

(Appellant's Brief at 7-8) (Emphasis added).

This is a misstatement of the holding of the Court of Appeals. The Court of Appeals did not cite KRS 336.985 in finding that the Act (i.e. KRS Chapter 337.505-550) provided due process. The Court cited *Lujan* for the proposition that because the Appellant had access to the courts, *the Act* (i.e. KRS Chapter 337) was constitutional. Indeed, at no time did TECO challenge, nor did the courts below rule upon the constitutional sufficiency of KRS 336.985. Note, however, that TECO incorrectly refers to the Act and KRS 336.985 interchangeably.

Next, TECO misconstrues both KRS 336.985, the Act and the term "enforcement" in arguing, because the Cabinet did not initiate the civil action against TECO, its right's were violated. On page 10 of its brief TECO states, because KRS 336.985 reads the Cabinet "shall" initiate a civil action to collect civil penalties "by the express language of the statute, the Cabinet is prohibited from taking certain enforcement actions for violations of *the Act* by any means other than initiating a civil action." (Appellant's Brief at 10) (Emphasis added). Further, "[t]he Court of Appeals expressed cognizance of this requirement in pointing out that 'in order to enforce the provisions of *the Act*, *the Cabinet* must bring a legal action.'*...to ensure that an aggrieved party is afforded a constitutionally sufficient due process hearing.*" (Appellant's Brief at 10-11). (Emphasis added). Therefore, by not initiating legal action against TECO "the Cabinet failed to follow the procedure identified by the Court of Appeals as being a requisite for due process. Here, the Cabinet *enforced the provisions of the Act by assessing fines and back wages against TECO and its prime contractors* and did so *without initiating a civil action against TECO.*" (Appellant's Brief at 11) (Emphasis added). Thus, the Cabinet failed "to

provide a due process hearing to TECO prior to enforcing the penalties against it, and instead left it to TECO to pursue a judicial hearing." (Appellant's Brief at 11).

TECO's argument above turns the holding of the Court of Appeals on its head. To begin, as previously pointed out, TECO interchangeably refers to KRS 336.985 and the Act as being one and the same, which of course is not the case. As the Court of Appeals stated, the only mechanism available to the Cabinet to enforce the Act is through the initiation of a civil action (as opposed to an administrative hearing); the Act does not mandate that the Cabinet initiate that action. Therefore, it does not follow that the Cabinet's failure to do so in any way prejudiced TECO. Further, the Court of Appeals certainly did not hold that "*the Cabinet* must bring a legal action.'*...to ensure that an aggrieved party is afforded a constitutionally sufficient due process hearing.*" (Appellant's Brief at 11)(Emphasis added). This is a complete misstatement of the lower court's holding. It is disingenuous of TECO to complain that it was somehow prejudiced by the Cabinet's forbearance in filing a civil action for the penalties, given that KRS 336.985(2) allows for the penalty to be compromised "after negotiation of the violation". TECO itself acknowledged that there were protracted settlement negotiations in this case, and that TECO benefited from a lowering of the amount of back wages as a result. (Appellant's Brief at 2). TECO's continued assertion that the assessment of fines and back wages against it is an enforcement action is plainly wrong, given that the Court of Appeals held that Cabinet enforces the Act when it initiates a civil action, not when it assesses back wages and penalties. The Court should note, contrary to TECO's assertion, the Cabinet did not assess civil penalties against the prime contractors, it merely informed them of their joint and several liability for the unpaid wages under KRS 337.990(12) and requested payment. (Appellant's Brief at 2-3). Finally, TECO's reference to debarment on page 12 of its brief is not relevant, because by TECOs own

admission the Cabinet did not pursue debarment against it in this action. And even if the Finance Cabinet had done so, TECO could have requested and received an administrative hearing pursuant to KRS Chapter 13B (See 200 KAR 5:315, Section 4). In the end, TECO had a right to file the declaratory action that it did, and it is simply nonsensical for it to now assert that by voluntarily exercising *its* due process rights, it is somehow deprived of due process. TECO was not prejudiced merely because it won the race to the courthouse.

The arguments made on pages 10-12 lay the foundation for what can only be described as TECO's "unconstitutionality by association" argument under the subheading "KRS 336.985 does not provide a constitutionally sufficient due process hearing procedure with respect to the Cabinet's demand for payment of back wages". (Appellant's Brief at 13). TECO's argument is so confusing that it must be set forth verbatim:

> As discussed herein, a *significant component of the Cabinet's enforcement actions against TECO was the imposition of back wages against TECO and its prime contractors.* Consequently, *the Court of Appeals determination that the Act was constitutional because the judicial process afforded under KRS 336.985 was sufficient to confer the benefits of a meaningful due process hearing upon TECO was in error* because the plain language of the statute leaves open the possibility that such protections would not extend to enforcement action taken by the Cabinet relating to back wages. As set forth above, the Cabinet's enforcement actions in assessing back wages against TECO and its prime contractors impugned TECO's property and liberty rights by virtue of damaging is [sec] reputation and business operations. The occurrence of any such enforcement actions without a corresponding due process hearing violates TECO's constitutional rights and, thus, makes KRS 336.985 constitutionally deficient.
>
> By virtue of the absence of any administrative hearing process in the Act, the Cabinet's failure to comply with the judicial process contained in KRS 336.985, and the lack of judicial process in KRS 336.985 relating to the imposition of back wages, TECO was left without any recourse to a due process hearing procedure at a meaningful time and manner; let alone prior to the Cabinet's taking enforcement actions against it. As a result, TECO experienced a deprivation of rights causing significant pecuniary damage and damage to its reputation and ability to conduct business…[T]his post-enforcement civil proceeding initiated by TECO is insufficient to fully protect its constitutional rights in this case. As such, the Court of Appeals' ruling should be overturned.

(Appellant's Brief at 13-14) (Emphasis added).

Once again, TECO's argument is based on a number of misstatements of the holding of the Court of Appeals. Again, the Court noted the Cabinet enforces the Act when it initiates a legal action in Circuit Court. Further, the Court below passed judgment on the Act (i.e. KRS Chapter 337.505-550) and upheld the constitutionality thereof because TECO, as an aggrieved party had access to and exercised its rights to ordinary judicial process through the filing of an original action. TECO misstates the holding, however, in an attempt to link the lower Court's ruling on the Act with KRS 336.985, arguing that *it* is unconstitutional and so too, by association, is the Act. As the above arguments are based upon a misstatement of the opinion of the Court of Appeals, they are completely without merit and should be rejected by this Court.

(b) **TECO's arguments made under subsections I(b) (i) and (ii) of its brief were not raised before the trial court or the Court of Appeals and should not be considered.**

Likewise, the issues raised and arguments made under the above subsections were never raised by TECO before either the trial court or the Court of Appeals. It has long been the rule before the appellate courts of this Commonwealth that specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal. Indeed, this Court has held "[a] new theory of error cannot be raised for the first time on appeal." *Springer v. Commonwealth*, 998 S.W.2d 439, 446 (Ky. 1999); see e.g., *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.2d 705, 734 (Ky. 2009)("More importantly, this precise argument was never made in the trial court. An appellate court 'is without authority to review issues not raised in or decided by the trial court.'" (quoting *Regional Jail Authority v. Tackett,* 770 S.W.2d 225, 228 (Ky. 1989). A review of TECO's Complaint (R. at 1) and Motion for Summary Judgment (R. at 366) in the trial court reveals that the above issues were not raised or argued. Consequently, the

Franklin Circuit Court did not rule upon or address the above issues when it ruled upon TECO's motion (R. at 592) and TECO's Motion to Alter, Amend or Vacate (R. at 605). Therefore, as "[t]he appellate court reviews for errors, and a nonruling is not reviewable when the issue has not been presented to the trial court for decision" *Turner v. Commonwealth,* 460 S.W.2d 345, 346 (Ky 1970), so too should TECO's argument on this ground be striken, because the issues raised by TECO in subsections I(b)(i) and (ii) of its brief to this Court were not presented or ruled upon by the trial court, this Court is without authority to consider the same in reviewing TECO's appeal. The Cabinet would further request that should the Court order oral arguments in this case, that the Court specifically prohibit TECO from arguing or addressing the issues raised in those subsections.

III. The Court of Appeals properly found that KRS Chapter 337 does not constitute an unconstitutional delegation of judicial or legislative power to the Labor Cabinet.

TECO argued before the Court of Appeals that because the Act does not provide definitions for each job classification, the Cabinet's determination that TECO had misclassified its workers amounts to an improper delegation of judicial power. In rejecting this argument, the Court correctly found that when the Cabinet issues a citation or seeks back wages it exercises an administrative, and not judicial function. (Ct. App. Opinion at 20). The Court noted the case cited by TECO for this proposition, *Kentucky Commission on Human Rights v. Fraser*, 625 S.W. 2d 852 (Ky. 1981), dealt with the delegation of judicial authority, and was therefore inapplicable.

The Court also addressed the other cases cited by TECO, *Butler v. United Cerebral Palsy of Northern Ky. Inc.*, 352 S.W. 2d 203 (Ky. 1961) and *Miller v. Covington Development Authority*, 539 S.W. 2d 1 (Ky. 1976), and similarly found those cases to be inapplicable to TECO's argument because they dealt with the delegation of legislative, rather than judicial,

authority to an administrative agency. (Ct. App. Opinion at 21). Those cases may be instructive, however, in that both hold that a delegation of authority to an administrative agency meets the "practical needs" and "safeguards" test where (a) the agency is a long-established agency with a track record of experience and expertise in a well-recognized field; and (b) the matters involved are so detailed that they are beyond the competence of a legislative body. Indeed, as the court noted in *Butler:*

> The legislature wants to encourage and lend a modicum of support to the special education of certain class of people. It does not wish, in so doing, to waste the taxpayers' money. The members of the legislature are allowed to meet in regular session only 60 days every two years. They have neither the time, facilities, nor qualifications to do more than indicate the class and fix the amount to be spent. At the state's disposal, however, is its board of education, an agency fully and better qualified than the legislature to establish and carry out whatever further policies and procedures may be necessary or desirable. This body also is one of the most responsible and long-established agencies of the state government.

Butler at 208.

The Labor Cabinet is an agency with over 60 years of experience enforcing wage and hour standards. The delegation to the Cabinet of the task of determining, on a locality by locality basis throughout the Commonwealth, the work performed by different job classifications certainly meets both criteria.

The Court of Appeals also noted that in determining classifications, the Cabinet does not have unfettered discretion. The Court found, "in determining the prevailing wage, the Cabinet must consider the wages paid "to the majority of laborers, workmen, and mechanics employed in each classification of construction upon reasonably comparable construction in the locality where the work is to be performed[.] KRS 337.505(1). Furthermore, the Cabinet must obtain information regarding the number of workers employed in other projects and their rates of pay as well as collective bargaining agreements in the locality. KRS 337.520(3). These constraints,

particularly those provided by the collective bargaining agreements, do not leave the Cabinet with unfettered discretion regarding classification." (Ct. App. Opinion at 20-21).

Before this Court TECO asserts that "whether couched in terms of an improper delegation of judicial or legislative power...in taking enforcement action against TECO the Cabinet acted outside of the powers vested to it under the Act by setting its own definitions of worker classifications and then arbitrarily adjudicating whether TECO's actions adhered to those definitions." (Appellant's Brief at 14-15). TECO made this same argument before the Court of Appeals, yet failed to cite the *Butler, Miller*, or *Fraser* cases in its brief. The failure to do so is a tacit acknowledgement that the analysis of those cases by the Court of Appeals was correct and that they do not stand for the proposition for which they were previously cited. In fact, TECO does not cite any new authority to support its argument, instead once again relying upon *Kerth v. Hopkins County Board of Education*, 346 S.W. 737 (Ky. 1961). Its reliance thereon is misplaced.

In *Kerth*, this Court struck down amendments to the prevailing wage statute enacted in 1960. Those amendments created a prevailing wage board with authority to establish prevailing wages. The General Assembly instructed the board to set the prevailing wage rates at the same rate that prevailed in the locality under collective bargaining agreements "if there are such agreements... in the locality applying to a sufficient number of employees to furnish a reasonable basis for considering those rates to be prevailing rates in the locality." *Kerth*, 346 S.W. 2d at 738. The statute was silent, however, on how the board was to determine the prevailing wage rates in localities where there were no labor agreements. Despite the lack of statutory authority, the prevailing wage board set rates in localities without agreements based upon agreements from localities that had agreements. In striking down the statute, the Court

correctly held that in those localities where there were no collective bargaining agreements, the prevailing wage board had no "reasonable basis" under the statute for determining the prevailing wage rates. *Id.*. As TECO acknowledges in its brief, in response to *Kerth* the General Assembly amended that section of KRS 337 to add additional criteria for the determination of prevailing wage rates in a given locality. See KRS 337.520(3).

TECO again attempts to equate the total lack of statutory authority in *Kerth* with the delegation of authority to the Cabinet under the current statute, to determine job classifications in each locality. This is simply not the case. As the Court of Appeals correctly found, the definition of prevailing wage in KRS 337.505(1) and the criteria for determining the prevailing wage rates in a given locality in KRS 337.520(3) give sufficient guidance regarding classification determinations. And while TECO states that "[a]dmittedly, and as the Circuit Court stated, due to the 'variety of skills and the nature of the labor covered by the prevailing wage laws' it may not be necessary (and indeed it may be impractical) for the Legislature to strictly define, by statute, every single category of worker classification" (Appellant's Brief at 17) that is exactly what they are asserting the General Assembly should have done. TECO then concludes that because the General Assembly did not define any classifications, the Cabinet's determination that TECO had misclassified its employees is arbitrary. TECO's compliant regarding the Cabinet's classification determination rings hollow because, as found by the Court of Appeals, TECO did not even attempt to classify the jobs performed by its employees. Rather, TECO arbitrarily split their hours between the skilled and laborer rates and paid them accordingly, rather than for the work actually performed or pursuant to any other classification system. (Ct. App. Opinion at 20). This practice not only enabled TECO to increase its profits at the expense of its employees, it allowed TECO to low-ball its bids, thus gaining an unfair

advantage over other contractors who included the proper payment of prevailing wages for each classification of worker in their bids.

Nor is TECO's claim that it was wholly without guidance regarding worker classifications remotely credible. TECO received from the public authority the prevailing wage schedule attached to, and made a part of, the specifications for the work. KRS 337.510. TECO formulated and submitted its bid to perform the work set forth in the specifications based upon its analysis of the costs associated with payment of the prevailing wage for each classification of work. (Tape 1 of 2; 8/27/08; 11:12:18 – 11:14:00)(R. at 1060-1061). TECO was awarded a contract and voluntarily entered into a contract that required TECO to pay "not less than the prevailing hourly rate of wages as determined by the commissioner..." KRS 337.510, which means the prevailing wage for each classification. It is ironic, therefore, that after first relying upon (and presumably understanding) the prevailing wage schedule in formulating and winning its bid for the work, TECO should now claim that KRS Chapter 337 fails to provide clear guidelines as to how work activities should be classified for purposes of assigning them a prevailing wage. Thus, TECO's assertion that, in the absence of clear statutory definitions, the Cabinet's classification determinations amount to an unconstitutional delegation of power to the Cabinet is without merit.

In sum, it is not possible for the General Assembly to define the varying job duties performed by every classification of construction workers in every locality across the Commonwealth. The delegation of that function to the Labor Cabinet was reasonable and necessary, and any determination made by the Cabinet in the enforcement of the prevailing wage requirements in KRS 337 are subject to judicial review through an original action, which is exactly what took place in this case. TECO's assertion that Cabinet's determination of worker

classifications under KRS Chapter 337 constitutes an unconstitutional delegation of judicial or legislative power is without merit, and the judgment of the Court of Appeals must be affirmed.

CONCLUSION

The Kentucky prevailing wage statutes are not unconstitutional. The laws of the Commonwealth of Kentucky provided TECO with due process, and the General Assembly did not unlawfully delegate judicial or legislative authority to the Cabinet. The Kentucky Labor Cabinet, therefore, respectfully requests that the Supreme Court uphold the constitutionality of the prevailing wage statutes and affirm the opinion of the Court of Appeals.

Respectfully submitted,

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